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No. 95-1468

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS, *et al.*,
Cross-Petitioners,
v.
LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; CORNELIUS P. DUGAN; and STEVE FORBES,
Cross-Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

JAN WITOLD BARAN
Counsel of Record
MICHAEL E. TONER
KEVIN J. MARTIN
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for Cross-Petitioners New York Republican State Committee and William D. Powers as Chairman

Of Counsel
JEFFREY T. BULEY
General Counsel, New York Republican State Committee
315 State Street
Albany, NY 12210
(518) 462-2601

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QUESTION PRESENTED

1. Whether a dispute concerning the manner in which a political party selects delegates to its national convention is justiciable?

PARTIES TO THE PROCEEDING

The plaintiffs are Larry Rockefeller, Holace Moranci, Neil Moranci, Donna Moranci, Mary Parrish, Lugenia Gordon, Helen Dalley, Betsy Webster, Betsy R. Blattmachr, Nancy Burner, and Cornelius P. Dugan. Steve Forbes, as an individual and in his capacity as a candidate for President, is a plaintiff-intervenor.

The defendants are William D. Powers, Chairman, New York Republican State Committee; New York Republican State Committee; New York State Board of Elections; Owen T. Smith, Carol Berman, Evelyn J. Aquila, and Helena Moses Donohue, Commissioners, New York State Board of Elections; New York City Board of Elections; Douglas Kellner, Vincent Cuttita, Paul Mejias, Vincent J. Velella, Weyman A. Carey, Ronald J. D'angelo, Seymour Sheldon, Kathleen Wagner, Gertrude Strohm, and Ferdinand Marchi, Commissioners, New York City Board of Elections; Erie County Board of Elections; Roger Blackwell and Ralph Mohr, Commissioners, Erie County Board of Elections; Nassau County Board of Elections; Suffolk County Board of Elections; Gerald Edelstein and Gerald Berger, Commissioners, Suffolk County Board of Elections; Monroe County Board of Elections; M. Betsey Relin and Ronald J. Starkweather, Commissioners, Monroe County Board of Elections.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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CROSS-PETITION FOR WRIT OF CERTIORARI

On February 12, 1996, the plaintiffs below and cross-respondents here ("plaintiffs") petitioned this Court for a writ of certiorari to review the United States Court of Appeals for the Second Circuit's December 21, 1995 judgment and January 18, 1996 written opinion in this case. *Larry Rockefeller, et al. v. William Powers, et al.*,

No. 95-1273. On March 13, 1996, the New York Republican State Committee and its chairman William D. Powers (collectively "State Party" or "Party") filed an opposition to plaintiffs' petition. The State Party hereby respectfully cross-petitions for a writ of certiorari.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals vacating the district court's preliminary injunction was issued January 18, 1996 and is reported officially at 74 F.3d 1367 (2nd Cir.); a copy of the decision is also reprinted at Appendix ("App.") 3a-37a of the plaintiffs' petition for writ of certiorari in this case. The memorandum of decision of the United States District Court for the Eastern District of New York is reported officially at 909 F. Supp. 863 (E.D.N.Y.) and is reproduced at App. 38a-57a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment in this case on December 21, 1995, and issued an opinion on January 18, 1996. This cross-petition for certiorari is being filed within 90 days of the date the court of appeals entered judgment pursuant to Supreme Court Rule 13.4. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes involved in this case are Chapter 586(2) of the Laws of New York, and New York Election Law § 6-136, which are reproduced respectively at App. 66a-69a & 70a-81a.

This case also involves State Party Rule 24, which provides that:

> The selection of delegates and alternative delegates to [the Republican] National Convention shall be governed by the Rules of the Republican Party (National), the Call for the National Convention, the Rules of the New York Republican State Committee and New York State Election Law. . . . Candidates for the positions of delegate and alternate delegate shall qualify for the ballot of the primary election pursuant to the designating petition process delineated in Articles two (2) and six (6) of the New York State Election Law.

STATEMENT OF THE CASE

On December 1, 1995, the United States District Court for the Eastern District of New York ruled that the State Party's delegate-selection rules violated the equal protection clause of the Fourteenth Amendment. The district court issued a preliminary injunction barring the State Party from using its rules in the March 7, 1996, New York presidential primary and barring New York election

officials from enforcing state statutes that implemented the Party's rules. App. 63a-65a. The district court subsequently issued a memorandum opinion and order. App. 38a-57a.

On December 21, 1995, a panel of the United States Court of Appeals for the Second Circuit heard the State Party's expedited appeal and, ruling from the bench, summarily reversed the trial court and vacated the preliminary injunction. On January 18, 1996, the panel issued a written opinion. App. 3a-37a.[1] A fuller discussion of the factual background of this case can be found in the Statement of the Case of the State Party's Opposition to Plaintiffs' Petition for Writ of Certiorari filed March 13, 1996.

REASONS FOR GRANTING THE WRIT

Few matters of federal law are more important than the fundamental right of political parties to choose the rules that will apply to the selection of delegates to their quadrennial national conventions. Of at least equal importance is the right of party members to participate in the delegate-selection process and to support the presidential candidates of their choice. Given that this case implicates all of these fundamental rights, little wonder that *all* of the parties in this action agree that the Court should grant certiorari and set this matter down for plenary review.

In seeking certiorari, plaintiffs contend that the Republican State Party's chosen method for selecting dele-

[1] After the Second Circuit vacated its first injunction, the district court ruled that the State Party's delegate rules violated the First Amendment on February 21, 1996, issuing a second preliminary injunction enjoining the Party from using its rules in the March 7 primary. On February 29, 1996, the Second Circuit affirmed. Because the New York primary was just days away, and to avoid creating further electoral confusion, the State Party decided not to seek emergency relief from this Court prior to the primary. In order to vindicate and protect its constitutional rights, however, the State Party plans to file a petition for certiorari regarding the second injunction.

gates to the Party's presidential primary ballot violates equal protection. The State Party cross-petitions for certiorari to confirm that in light of this Court's rulings in *O'Brien v. Brown, Cousins v. Wigoda* and *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, challenges to a political party's presidential-selection rules are not justiciable particularly where, as here, the challengers are party dissidents who seek to substitute their own views for the collective judgment of their political party.

Challenges to a political party's standards and procedures for delegate selection simply are not justiciable. Indeed, this Court has *never* entertained, on the merits, a challenge to the manner in which a political party selects delegates to its national convention. The delegate-slate signature rules at issue here reflect judgments by a political party as to how to govern itself. New York Republican delegates chosen by Party members under these procedures will not merely cast ballots for their preferred presidential candidates at the Republican National Convention this summer; they also will write the Republican Party platform, adopt Party rules, confirm delegate credentials, and otherwise provide for Party governance.

Given the extraordinary associational interests that are at stake, this Court should reaffirm in the face of conflicting opinions among several circuit courts that a political party has the fundamental right to determine for itself, free from judicial interference, the rules and procedures that will govern the selection of delegates to its national convention.

I. PLAINTIFFS' CHALLENGE TO THE STATE PARTY'S STANDARDS AND PROCEDURES FOR CHOOSING ITS CONVENTION DELEGATES IS A QUINTESSENTIAL INTERNAL PARTY DISPUTE THAT IS NOT JUSTICIABLE.

The trial court's preliminary injunction and the Second Circuit's vacation of that injunction rest on the resolution of issues that are not justiciable. This Court has repeatedly held that a core component of the freedom of association protected by the First Amendment is "a political party's decisions about the identity of, and *the process for electing*, its leaders." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 229 (1988) (emphasis added); *see also Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 124 (1981) ("[a] political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution").

Of course, the Court did reach the merits and did intrude into a political party's primary process in the so-called "White Primary" cases. *See, e.g., United States v. Classic*, 313 U.S. 299, *reh'g denied*, 314 U.S. 707 (1941); *Smith v. Allwright*, 321 U.S. 649, *reh'g denied*, 322 U.S. 769 (1944). In those cases, however, the primaries were (1) designed to and effectively excluded African-Americans from any meaningful vote and, hence, implicated the nation's compelling interest in eradicating racial discrimination, and (2) the primaries virtually served as the general election because success in the primary was "tantamount to election."

Neither of these circumstances is present here. Moreover, the State Party adopted Rule 24 only after full and open debate.[2] Under these circumstances, no compelling

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[2] Party members have numerous opportunities to propose modifications to the delegate-selection rules. In fact, at least one of the plaintiffs in this action—Lugenia Gordon—has repeatedly proposed

consideration exists to lead courts to stretch the bounds of justiciability. The Court should review this case and confirm that this intra-party political dispute and others like it are not justiciable.

A. This Court Has Repeatedly Cautioned That Federal Courts Should Not Intervene In Internal Disputes About How Political Parties Select Delegates To Their National Conventions.

In three landmark decisions over the last two decades, this Court regarded disputes over how political parties select national convention delegates as non-justiciable. Despite the plaintiffs' assertion that their challenges "[do] not purport to interfere with the operation of the Republican National Convention," (Plaintiffs' Dec. 15, 1995 Appeals Brief at 40), and the panel's similar finding, (App. 19a-20a) such is clearly not the case. Delegates *are* the Convention. How delegates are selected directly determines the composition of the Convention. When federal courts supplant a political party's delegate-selection rules, the party is forced to choose between abandoning its rules and seating the disputed delegates at the convention, or asserting its First Amendment prerogatives and seating only those delegates who have complied with party rules, thereby risking contempt. *See Cousins v. Wigoda,* 419 U.S. 477 (1975).

In *O'Brien v. Brown,* 409 U.S. 1 (1972), this Court stayed an attempt by the District of Columbia Circuit to regulate the seating of delegates at a national convention. The Court expressed "grave doubts" about the propriety of the court of appeals' ruling, which had overturned the

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modifications to the National Republican Party delegate-selection rules, but Ms. Gordon has been unable to persuade her fellow Republicans to change the rules. *See* State Party Dec. 8, 1995 Appeals Brief at 5. Having failed to persuade her fellow Republicans, Ms. Gordon and the other plaintiffs essentially seek to use the federal courts to substitute their own judgment for that of the majority of their party.

Democratic Party's decision to seat certain delegate groups at the 1972 Democratic National Convention, thereby "interject[ing the court] itself into the deliberative processes of a national political convention." *Id.* at 4. The Court expressed serious reservations regarding the "power of the federal judiciary to review actions heretofore thought to lie in the control of political parties." *Id.* The Court concluded that "[h]ighly important questions [were] presented concerning justiciability" and declined to reach the merits of the delegate dispute. *Id.*

Just two years later in *Cousins v. Wigoda,* 419 U.S. 477 (1975), the Court declined to disturb the Democratic Party's decision to seat one of two competing groups of Illinois delegates at its national convention. Stressing that the "National Democratic Party and its adherents enjoy a constitutionally protected right of political association," (*id.*, at 487) the Court concluded that " 'the convention itself [is] the proper forum for determining intra-party disputes as to which delegates [should] be seated.' " *Id.* at 491 (quoting *O'Brien,* 409 U.S. at 4). The Court refused to intervene, even though the Democratic Party's decision to honor the slate chosen by party caucus resulted in the exclusion of a delegate slate that had been selected in the Illinois Democratic primary, held pursuant to Illinois state law.[3]

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[3] Ironically, the lower courts here reached the merits despite the fact that New York state law deferred to and was fully consistent with the State Party's delegate-selection rules. Revealingly, the New York Attorney General below noted that New York State deferred to the State Party's rules because the state concluded it would be unconstitutional not to do so:

> Mindful of First Amendment associational rights of the parties, especially in light of emphatic pronouncements from the Supreme Court over the past 20 years, the New York Legislature would never presume to dictate to the parties how national convention delegates should be selected or allocated.

New York Attorney General Dec. 8, 1995 *Amicus Curiae* Appeals Brief at 7-8. *See also id.* (noting that "states may not interfere

Finally, in *LaFollette*, 450 U.S. 107, this Court declined to upset the Democratic Party's decision not to seat a state's group of delegates that had been selected in a state-mandated open primary. Consistent with *Cousins v. Wigoda*, *LaFollette* reaffirmed that it was for the Democratic Party and "not the Wisconsin Legislature or any court—to determine the appropriate standards for participation in the Party's candidate selection process." *Id.* at 124, n.27. *See also id.* at 123 ("it is not for the courts to mediate the merits of this dispute").[4]

In the wake of these Supreme Court decisions, several courts of appeals, unlike the Second Circuit here, have held that intra-party delegate-rules disputes are not justiciable. *See Wymbs v. Republican State Executive Comm.*,

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with a political party's discretion protected by the First Amendment in how to organize itself, conduct its affairs and select its leaders") (citing *Eu v. San Francisco County Democratic Comm.*, 489 U.S. 214, 230 (1989)); *id.* at 8 ("parties may not be hindered in taking internal steps affecting party process for the selection of candidates") (citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224-25 (1986).

Thus, the New York Attorney General recognized that if the State had altered the State Party's delegate-selection rules as the district court did here, it would have been unconstitutional.

[4] The associational rights at stake here are even stronger than those that the Court found to be controlling in *LaFollette*. In *LaFollette*, the Democratic Party was still able to choose the delegates to the national convention; those delegates were merely bound to cast their votes for president at the national convention in accord with the results of Wisconsin's open primary. In this case, the process of selecting the delegates themselves is directly at issue, and the State Party's choice as to the appropriate process for selecting those delegates has been altered. Even the dissenting justices in *LaFollette* agreed that such direct interference with a political party's delegate-selection process raises serious First Amendment concerns and likely impinges on the constitutionally protected associational rights of the party. *See id.* at 129 (Powell, J., dissenting) ("While this regulation affecting participation in the primary is hardly insignificant, it differs substantially from the direct state interference in delegate selection at issue in *Cousins*.").

719 F.2d 1072, 1082-83 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (holding that a dissident group of Republicans' challenge to the Florida Republican Party's delegate-selection rules was non-justiciable and noting that " 'it is not for the courts to mediate the merits of [such a] dispute' ") (quoting *LaFollette*, 450 U.S. at 123-24); *see also Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 841 (4th Cir. 1987) (ruling that a challenge to a DNC rule requiring equal division of delegates based on gender was non-justiciable). *Cf. Ripon Soc'y, Inc. v. National Republican Party*, 525 F.2d 567, 577-78 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976) (holding that First Amendment considerations protected the Republican Party's bonus-delegate rule and might well render it non-justiciable). Thus, prior to the Second Circuit panel's ruling, it was settled federal law that a political party has a constitutionally protected right to establish delegate-selection rules free from judicial interference.[5]

B. Despite Clear Precedent To The Contrary, The Court Of Appeals Found This Intra-Party Rules Dispute To Be Justiciable And Impermissibly Interferred With The State Party's Associational Rights.

The Second Circuit panel erroneously found it could entertain plaintiffs' attempts to substitute their own views of what the State Party's delegate-selection rules should be for the collective decision of their Party. In so ruling, the panel disregarded this Court's clear teachings, created a split within the courts of appeals, and threatens to expose

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[5] The panel sought to distinguish *O'Brien* and this Court's other decisions involving political party national conventions by asserting that this case does not affect the Republican National Convention and, in any event, does not involve a challenge to national party rules. *See* App. 19a-20a n.12. Even if this case did not affect the Republican National Convention—and it does—the panel's attempt to distinguish *O'Brien* presumes without citation that state party delegate-selection rules are more justiciable than national party delegate rules. This court, however, has never so held.

the internal workings of political parties to unjustified future judicial interference.

In ruling that this intra-party dispute is justiciable, the panel noted that although the State Party had chosen the ballot-access scheme that was employed, New York State had merely offered the Party a choice of two statutory schemes. The panel concluded that:

> Although the Republican State Committee is therefore the but-for cause of the supposed disparity, the Committee's selection of one of two state-offered options does not abrogate state action. . . . We do not consider the justiciability of a challenge to the State Republican Committee's *choice* of the option embodied in Section 2. The challenge here is to state laws that create (although they do not necessarily impose) the five percent or 1250 signature requirement.

Rockefeller v. Powers, App. 17a (emphasis in original).

The panel failed to address, however, the fact that the state only enacted this two-prong statutory scheme at the behest of the Democratic and Republican State Parties. In fact, the State Party expressly asked New York State to adopt the 1250 or 5% signature requirement. *See* New York Attorney General Dec. 8, 1995 *Amicus Curiae* Appeals Brief at 7 ("It is by no means a 'state secret' that Chapter 586 was enacted to recognize the process dictated by the respective rules of the Republican and Democratic Parties simply to aid the major parties in an orderly undertaking.").

Public commentary confirms that the rules challenged here are the Party's rules.[6] The State Party and its chairman are defendants in this case because they were responsible for the disputed procedures. The district court spe-

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[6] *See, e.g.*, "Mr. D'Amato, Let Your People Go," *New York Times*, Mar. 30, 1995, at A22; Dao, "Legal Maze Gives Dole Big Edge in New York G.O.P. Primary," *New York Times*, Sept. 17, 1995, at 43.

cifically enjoined these defendants from observing Rule 24 and issued an injunction altering the Party's delegate-selection rules. The State Party does not forfeit its First Amendment associational rights by taking advantage of the state's election facilities. Moreover, the state's mere acceptance of the State Party's delegate-selection rules, upon which the Party unquestionably had the constitutional right to decide, does not transform this matter into a justiciable controversy.[7] The panel's decision to reach the merits presumes that there is a constitutional right to vote for a national convention delegate, which this Court has never recognized. Even assuming such a right were to exist, this Court has not addressed how that right would be balanced against competing constitutional rights, such as the State Party's associational rights.

The panel relied heavily upon *Bullock v. Carter*, 405 U.S. 134 (1972), for its ruling that this case is justiciable. In *Bullock*, this Court invalidated a Texas statute which required prospective candidates to pay an exorbitant filing fee in order to participate in a primary election. The Court expressly addressed the issue of justiciability, holding that "the mechanisms of such elections is the creature of state legislative choice and hence is 'state action.'" *Id.* at 140. The Court dismissed Texas's contention that not every aspect of a primary election is judicially cognizable, concluding that justiciability was not an issue because "[the Court was] concerned with the constitutionality of a state law rather than action by a political party." *Id.* at 141. *Bullock* did not concern any political party's delegate-selection procedures.

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[7] New York State not only has a rational basis, but indeed a compelling governmental interest, to accommodate the State Party's delegate-selection rules. *See* note 3, *supra*. The First Amendment shields the State Party's choice of ballot access standards from governmental interference. Thus, the Party's delegate rules should be free of any judicial review, at least absent a compelling reason to intervene, such as racial discrimination, which is not present here.

By contrast, the delegate-selection rules at issue here were designed by the State Party. All parties to this action agree that it was the Republican and Democratic State Parties that chose their respective delegate-selection rules and that these alternatives were merely codified by the New York State Legislature. In fact, the plaintiffs acknowledged below that the state Legislature "permitted the leadership of each major party to design separate rules to govern each party's method for designating and electing candidates for delegates from New York to its national convention." Plaintiffs' Amended Complaint at ¶ 32. Similarly, everyone agrees—and the plaintiffs stressed below—that it was the Republican "State Committee [that] caused Section 2 of Chapter 322 to be enacted." *Id.* at ¶ 44.[8] Thus, unlike Texas in *Bullock*, New York only enacted its two-prong ballot-access statutory scheme at the express direction of the state Democratic and Republican Parties.[9]

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[8] *See also* Jeffrey T. Buley Affidavit in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Defendants' Motion to Dismiss at ¶ 14:

> Chapter 586, Section 2 of the 1995 Laws of the State of New York codifies Rule 24 of the [Party] Rules. The October 31, 1995 letter from defendant Powers to the State Board 'opting' to follow the procedures of Sec. 2 of Chapter 586 for the 1996 New York Republican presidential primary was a mere formality.

In addition, plaintiffs pointed out below that the State Committee even decided the timing of the delegate-petition process. *See* Plaintiffs' Amended Complaint at ¶ 45 ("[A]t the insistence of the State Committee and Powers, Chapter 586 was enacted so as to require that Republican petition signatures for the presidential primary ballot be gathered between November 28, 1995 and January 4, 1996.").

[9] The Second Circuit panel's reliance (App. 18a-19a) on *Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890 (2d Cir. 1980), and *Montano v. Lefkowitz*, 575 F.2d 378 (2d Cir. 1978), is similarly misplaced. In *Mrazek*, the court rejected an equal protection challenge to a party rule that permitted party members outside a particular political division to participate in the nomination of non-party candidates seeking to represent the district in the New York legislature. In upholding the party rule, the court cautioned

The panel also erroneously relied upon *Gray v. Sanders*, 372 U.S. 368 (1963), in ruling that this controversy is justiciable. In *Gray*, the Court applied *Baker v. Carr* one-person, one-vote principles to strike down Georgia's county unit system through which primary voting was disproportionately weighted by counties. *Gray*, however, arose out of a one-party state in the early 1960s, in which success in the Democratic primary was tantamount to election to governmental office. *See Sanders v. Gray*, 203 F. Supp. 158, 167 (N.D. Ga. 1962) ("It is a fact known to all that the Democratic candidate has, without exception, at least during the present century, been the choice of voters at the General election."). Thus, as a functional matter, the primary really was the general election; therefore, one-person, one-vote principles applied. By contrast, the primary election here is for Republican Party office only.

Moreover, the electoral device at issue in *Gray* was not used to elect party members who are responsible for formulating party policy and enacting party rules. There was no allegation in *Gray* that the plaintiffs' challenge to the unit rule threatened any political party's First Amendment associational rights, nor was there any indication of an intra-party dispute concerning the unit rule. Therefore, *Gray* did not implicate the serious justiciability concerns that arise when federal courts attempt to adjudicate internal party conflicts.

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that "[political] parties are best situated to define the proper constituencies of their nominating delegates," and that such party "determinations should not be invalidated unless such definitions are utilized to exclude or disadvantage discrete groups or minorities." *Id.* at 897 n.11.

Similarly, in *Montano*, the court invalidated a New York law and a Democratic party rule that permitted individuals to vote on nominations to fill U.S. House vacancies who lived outside of the affected congressional district. Revealingly, other courts have questioned the continued validity of *Montana*. *See, e.g., Di Rosa v. Dodd*, 514 F. Supp. 258, 262 (E.D.N.Y. 1981) (questioning whether *Montano* is tenable after *LaFollette* and *Mrazek*).

That *Gray* does not apply to intra-party presidential primary disputes has been recognized by the Eleventh Circuit. For example, in *Wymbs*, 719 F.2d 1072, the trial court had applied the one-person, one-vote principle of *Gray* in invalidating the Florida Republican Party's delegate-selection rules. Reversing and holding the matter to be non-justiciable, the Eleventh Circuit noted that the

> district court [had] passed over the first amendment in its heavy reliance upon *Gray v. Sanders* . . . *LaFollette* instructs that "[t]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association . . . [A] State, or a court, may not constitutionally substitute its own judgment for that of the Party."

Wymbs, 719 F.2d at 1084 (citations omitted). The district court and the panel here made the same fundamental mistake.[10]

* * * *

The State Party's delegate-selection rules reflect a judgment by a political party as to how to govern itself. The Republican National Committee, which until its dismissal was a co-defendant in the trial-court proceedings, highlighted the importance of this process:

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[10] The other federal circuit court decision that arguably reached the merits of an internal delegate rules dispute is *Ripon Soc'y v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976). The court there reversed a trial court judgment that the Republican Party's bonus-delegate rule was unconstitutional. However, the opinion noted that the grounds for reversal came very close to a holding that the issue was not justiciable, and reserved the issue of whether, in fact, the issue was not justiciable. *Id.* at 577-78. The outcome was not affected since the rule survived in either event. *See also Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 841 (4th Cir. 1987) (holding a challenge to the DNC's "Equal Division Rule" to be non-justiciable and suggesting that *Ripon* is best understood as a non-justiciability ruling).

> "Between quadrennial national conventions, the [RNC] is the embodiment and manager of the affairs of the Republican National Party. *During the Republican National Convention, the convention itself is the Party. It conducts all of its own business, including the resolution of credentials disputes, and sets the rules and platform upon which the Republican National Committee will act until the next quadrennial convention.*"

Defendant Republican National Committee's Memorandum of Law Opposing Plaintiffs' Motion for Preliminary Injunction at 2 (quoting *Wymbs*, 719 F.2d at 1074 n.7) (emphasis added).

Given that the New York delegates selected to the Republican National Convention through State Party Rule 24 will *constitute* the National Republican Party for the next four years, the panel's decision to reach the merits of this dispute implicates extraordinary First Amendment associational interests. Moreover, if left unreviewed, this ruling will subject the procedures of the State Party to unjustified future judicial oversight, thereby threatening the ability of New York Republicans to freely exercise their fundamental right of political association.

CONCLUSION

For the foregoing reasons, the Court should grant this petition and set the case for plenary review.

Respectfully submitted,

JAN WITOLD BARAN
Counsel of Record
MICHAEL E. TONER
KEVIN J. MARTIN
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for Cross-Petitioners New York Republican State Committee and William D. Powers as Chairman

Of Counsel
JEFFREY T. BULEY
General Counsel, New York Republican State Committee
315 State Street
Albany, NY 12210
(518) 462-2601

March 13, 1996

(2)

Supreme Court, U.S.
FILED
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No. 95-1468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; CORNELIUS P. DUGAN; and STEVE FORBES,

Petitioners-Cross-Respondents,

vs.

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS et al.,

Respondents-Cross-Petitioners.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION

BURT NEUBORNE
Counsel of Record
40 Washington Square South
New York, New York 10012
(212) 998-6172

RICHARD D. EMERY
RICHARD D. EMERY, P.C.
1740 Broadway, 25th Floor
New York, New York 10019
(212) 603-6426

Of Counsel:
ANDREW G. CELLI, JR.
JOHN R. CUTI

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No. 95-1468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; CORNELIUS P. DUGAN; and STEVE FORBES,

Petitioners-Cross-Respondents,

vs.

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS et al.,

Respondents-Cross-Petitioners.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION

Petitioners respectfully submit this brief in opposition to the cross-petition for certiorari filed herein. The decision below was issued on January 18, 1996. It is reproduced at pp. 3a-37a of plaintiffs' petition for certiorari, and is reported at 74 F.3d 1367 (2d Cir.), rev'g, 909 F. Supp. 863 (E.D.N.Y. 1996). The petition for certiorari was filed on February 12, 1996. The cross-petition for certiorari was docketed on March 13, 1996. Petitioners believe that events transpiring subsequent to the filing of the petition for certiorari herein

have rendered this controversy moot. *See United States v. Chesapeake and Potomac Telephone Company of Virginia,* 116 S.Ct. 1036 (1996). In addition, the cross-petition's jurisdictional arguments are foreclosed by settled precedent of this Court.

I. EVENTS TRANSPIRING SUBSEQUENT TO THE FILING OF THE PETITION FOR CERTIORARI HEREIN HAVE RENDERED THESE PROCEEDINGS MOOT

The petition and cross-petition herein arise out of litigation surrounding the efforts of delegates pledged to support the candidacy of Malcolm "Steve" Forbes to gain a place on the ballot in the New York State Republican Presidential primary election held on March 7, 1996. The petition sought review of a decision of the United States Court of Appeals for the Second Circuit, issued on January 18, 1996, rejecting an Equal Protection challenge to the ballot access rules established by New York Sessions Law, Chapter 586(2). *Rockefeller v. Powers*, 74 F.3d 1367 (2d Cir.), rev'g, 909 F. Supp. 863 (E.D.N.Y. 1996). Events transpiring after the filing of the petition for certiorari on February 12, 1996, have rendered these proceedings moot.

First, and most important, on February 29, 1996, a panel of the Second Circuit (Winters, Meskill and Van Graafeiland, JJ) granted petitioners full relief, affirming the grant of a preliminary injunction placing delegates pledged to support the candidacy of petitioner Forbes on the ballot throughout New York State. *See Rockefeller v. Powers*, 1996 WL 87475 (2d Cir. 1996), SA-1-SA-5. The Circuit found that the ballot access rules required by Chapter 586(2) imposed an "undue burden" on candidates and voters seeking to associate for political ends. A copy of the Second Circuit opinion is annexed hereto as Supplemental Appendix 1. A copy of the decision and order of the United States District Court for the Eastern District of New York (Korman, J.) is annexed hereto as Supplemental Appendix 2, SA-6-SA-32.

New York officials fully complied with the Second Circuit's order. Accordingly, petitioners have received all the relief they sought, rendering further proceedings in this Court moot.

Second, while the "continuing controversy" doctrine might provide a basis for continued post-election appellate review in certain settings, it has no applicability to this case because the statute in question, Chapter 586(2), is applicable only to the 1996 election, and, by its terms, is "deemed repealed" on December 31, 1996. (*See* Chapter 586 (5), p. 81a of plaintiff's petition for certiorari.) Moreover, it is highly unlikely that Chapter 586(2) will be re-enacted in its current form, since both the Governor of the State of New York, and its junior Senator, the two ranking Republican office-holders in the state, have publicly called for reform of the primary ballot access process. *Fonz Bites The Ballot And Admits Mistake,* N.Y. Daily News, Mar. 8, 1996, at 7.

Since petitioners have received complete relief in a related but collateral proceeding, and since it is highly unlikely that the legal issues raised by this proceeding will recur between the parties, petitioners suggest that the petition and cross-petition herein be dismissed as moot and that, accordingly, the Court of Appeals' January 18, 1996 decision be vacated. *United States v. Munsingwear*, 340 U.S. 36, 39-41 (1950).

II. RESPONDENTS' JURISDICTIONAL ARGUMENTS IGNORE THIS COURT'S DECISION IN NIXON V. HERNDON

Respondents' cross-petition attempts to characterize the action of the Second Circuit in reviewing the constitutionality of the ballot access rules imposed by Chapter 586(2) as an intrusion into the autonomy of a political party. Petitioners have no quarrel with respondents' assertion that political parties have a First Amendment right to organize their internal affairs free from state intrusion. Thus, if the Connecticut Republican Party wishes to operate a primary open to all, Connecticut may not forbid the practice. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). Similarly, if party officials wish to endorse a favored candidate in connection

with a primary, California may not forbid the endorsement. *Eu v. San Francisco Democratic Committee*, 489 U.S. 214 (1988). But respondents seek to expand the First Amendment right to internal party autonomy into a general immunity from judicial review, even when the party has codified its wishes into state law.

For seventy years this Court has recognized that when a political party uses the mechanism of a state statute to advance its electoral ends, the statute is fully subject to constitutional review. In *Nixon v. Herndon*, 273 U.S. 536 (1927), this Court struck down a Texas statute, enacted at the behest of the Texas Democratic Party, that banned blacks from voting in party primary elections. In this case, the election rules at issue are likewise codified in a state statute. Chapter 586(2). Thus, this case harkens back to *Nixon v. Herndon*, *supra*, for the wholly unremarkable proposition that, when a primary election is organized pursuant to statute, the statutory rules governing voting and access to the ballot are subject to judicial review to assure compliance with the Constitution.[1]

Respondents make a final effort to avoid judicial review, arguing that, while statutes governing primaries may be subject to judicial review in many cases, a court cannot interfere with the operation of a national party convention. The decisions of national party conventions, they argue, are virtually

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[1] The familiar story of the White Primary cases involves the extension of *Nixon v. Herndon* to other forms of party control over state election machinery. *See Nixon v. Condon*, 286 U.S. 73 (1932)(extending *Herndon* to statutory delegations of state power to party officials); *Grovey v. Townsend*, 295 U.S. 45 (1935)(declining to apply *Herndon* to state convention where no statutory delegation); *Smith v. Allwright*, 321 U.S. 649 (1944)(reversing *Grovey* where nominee of convention receives automatic ballot access); *Terry v. Adams*, 345 U.S. 461 (1953)(extending *Herndon* to pre-primary election).

Since respondents have caused the New York ballot access rules in question to be codified in a state statute, this case is governed by *Herndon* itself.

immune from judicial review, except perhaps in cases of racial exclusion.

The precise legal status of a national party convention raises difficult and unresolved legal issues. *Cf. Morse v. Republican Party of Virginia,* 1996 WL 134280 (Mar. 27, 1996). On one hand, since the nominee of a major party convention receives automatic ballot access in all 50 states, the reasoning of *Smith v. Allwright* militates in favor of subjecting the convention to constitutional review. Similarly, since each major party receives a substantial government subsidy to pay for a national convention, the acceptance of government funding may subject the convention's decisions to a degree of constitutional scrutiny. *Compare FCC v. League of Women Voters*, 468 U.S. 364 (1984) *with Rust v. Sullivan*, 500 U.S. 173 (1991).

On the other hand, the political nature of the national party convention argues for a high degree of autonomy. *See, e.g., Democratic Party v. Wisconsin*, 450 U.S. 107 (1981)(cannot force convention to accept delegates elected in open primary); *O'Brien v. Brown*, 409 U.S. 1 (1972)(*per curiam*)(cannot prevent convention from seating delegates to reflect proportional vote in place of winner-take-all delegates); *Cousins v. Wigoda*, 419 U.S. 477 (1975)(cannot force convention to seat delegates elected by slates).

Whatever the ultimate resolution of the legal status of a national party convention, one thing is clear: the issue has no relevance to this case. The preliminary injunction at issue here does not purport to interfere with the operation of the Republican National Convention, or to supplant any of its rules. The unconstitutional ballot access rules codified in Chapter 586(2) are not required by national party rules. They are purely a construct of New York law.

The method of electing delegates to the Republican convention is largely left to each state. Not surprisingly, the rules governing Republican Presidential primary ballot access vary widely from state to state, ranging from the mere payment of a filing fee, to selection by the Secretary of State, to relatively

liberal "modicum of support" requirements, to the Draconian scheme which, until recently, applied only in New York State. *See* SA-30-SA-32 (summary of states' ballot access requirements for presidential primary). The only national party requirement -- the election of three delegates from each Congressional District -- remains completely untouched by Judge Korman's order. Accordingly, no basis whatever exists to shield New York's ballot access rules from constitutional review.

CONCLUSION

For the above-mentioned reasons, the petition and cross-petition for certiorari should be dismissed as moot. If, however, the Court wishes to consider the matter, the cross-petition for certiorari should be dismissed on the merits.

Dated:

April 3, 1996
New York, New York

Respectfully submitted

BURT NEUBORNE
(Counsel of Record)
40 Washington Square South
New York, New York 10012
(212) 998-6172

RICHARD EMERY
1740 Broadway
New York, New York 10019

Attorneys for Petitioners/
Cross-Respondents

Of Counsel:
ANDREW G. CELLI, JR.
JOHN R. CUTI

Supplemental Appendix 1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1694—August Term, 1995

(Argued: February 28, 1996

Decided: February 29, 1996)

Docket No. 96-7173

LARRY ROCKEFELLER; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; and CORNELIUS P. DUGAN,

Plaintiffs-Appellees,

STEVE FORBES,

Plaintiff-Intervenor-Appellee,

—against—

WILLIAM D. POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE,

Defendants-Appellants,

NEW YORK STATE BOARD OF ELECTIONS; OWEN T. SMITH; CAROL BERMAN; EVELYN J. AQUILA, and HELENA MOSES DONOHUE, Commissioners, New York State Board of Elections; NEW YORK CITY BOARD OF ELECTIONS; DOUGLAS KELLNER; VINCENT CUTTITA; PAUL MEJIAS; VINCENT J. VELLELLA; WEYMAN A. CAREY; RONALD J. D'ANGELO; SEYMOUR SHELDON; KATHLEEN WAGNER; GERTRUDE STOHM, and FERDINAND MARCHI, Commissioners, New York City Board of Elections; ERIE COUNTY BOARD OF ELECTIONS; ROGER BLACKWELL and RALPH MOHR, Commissioners, Erie County Board of Elections; NASSAU COUNTY BOARD OF ELECTIONS; STEPHEN SABBETH,

Commissioner, Nassau County Board of Elections; SUFFOLK COUNTY BOARD OF ELECTIONS; GERALD EDELSTEIN and GERALD BERGER, Commissioners, Suffolk County Board of Elections; MONROE COUNTY BOARD OF ELECTIONS; M. BETSY RELIN and RONALD J. STARKWEATHER, Commissioners, Monroe County Board of Elections; NATIONAL REPUBLICAN COMMITTEE,

Defendants.

Before:

VAN GRAAFEILAND, MESKILL and WINTER,

Circuit Judges.

Appeal from a preliminary injunction issued by the United States District for the Eastern District of New York (Edward R. Korman, *Judge*), ordering that defendants place slates of delegates committed to intervenor Forbes on the Republican primary ballot in four New York congressional districts. We affirm.

THOMAS W. KIRBY, Wiley, Rein & Fielding, Washington, D.C., (Jan Witold Baran, Kevin J. Martin, of counsel), *for Defendants-Appellants.*

Thomas J. Spargo, East Berne, New York, *for Plaintiff-Intervenor-Appellee.*

RICHARD D. EMERY, New York, New York (Andrew G. Celli, Jr., of counsel) *for Plaintiffs-Appellees.*

BURT NEUBORNE, The Democracy Project, New York, New York, *for Plaintiffs-Appellees.*

WINTER, *Circuit Judge,*

The instant appeal involves Judge Korman's order that the defendants place on the Republican presidential primary ballot in the 9th, 15th, 18th, and 24th New York congressional districts, the names of delegates committed to vote at the Republican National Convention for intervenor Forbes. Judge Korman based this order on his conclusion that New York ballot access requirements place a substantial burden on certain candidates, that many of these requirements serve no legitimate state interest, and that, but for these onerous and unjustified requirements, the Forbes delegates would be on the ballot in the districts in question. *See e.g. Storer v. Brown,* 415 U.S. 724 (1974). Exclusion of the Forbes delegates therefore violated the First Amendment as incorporated by the Fourteenth. Our prior opinion in this matter was expressly limited to the question of whether New York ballot access laws violated the Equal Protection Clause. We now address the First Amendment issues. We agree with the district court and affirm.

Familiarity with an earlier opinion by the district court, *Rockefeller v. Powers,* 909 F. Supp. 863 (E.D.N.Y. 1995), with an opinion by this court vacating an injunction issued by the district court, *Rockefeller v. Powers,* No. 95-9189, 1995 WL 790831 (2d Cir. Dec. 21, 1995), and with the memorandum and order on appeal at this time, *Rockefeller v. Powers,* No. 95-CV-4478, slip op. (E.D.N.Y. Feb. 21, 1995), is assumed. Because the New York presidential primary is scheduled for March 7, 1996, our decision will be rendered with considerably less elaboration than is found in a typical opinion.

With regard to the question of the substantiality of the burden placed on candidates seeking access to the primary ballot, the district court found that candidates without the support of the state Republican leadership were substantially burdened by the combination of (i) the requirement that a slate of delegates collect signatures in each district amounting to 5% or

1250 registered Republicans, whichever is less; (ii) the requirement that the collection of signatures must occur in a period of 37 days, during which there are several important holidays, inclement weather, school and family vacations, and short periods of daylight; (iii) a rule limiting a voter from signing petitions for more than one candidate, thus reducing the total pool available to those collecting signatures; (iv) a host of rules defining what is a valid signature, including rules as to the qualification of witnesses to signings and inclusion of the election or Assembly district numbers of signers; and (v) other highly technical requirements that concern the presentation of petitions containing the signatures to election officials. We agree that this combination of New York requirements severely hampers candidates in contacting a sufficient number of registered Republicans and in collecting, legally documenting, and validly presenting their signatures. Indeed, as the district court found, at least 140% of the requisite 5%/1250 signatures usually must be collected to survive hypertechnical challenges and to succeed in getting a delegate slate on the ballot. (The Powers affidavit suggests that signatures of 140% of the required number is too little.)

With regard to justification for the substantial burdens on candidates, the district court noted that New York ballot access rules are far more burdensome than those adopted by virtually every other state. Indeed, the 5%/1250 requirement is itself onerous in comparison with other states even without the very technical rules concerning the validation and presentation of the signatures that require as a practical matter the collection of at least 140% of the requisite number of signatures. The court further found that the rules as to the qualification of witnesses to signing, listing of election or Assembly district numbers for signers, and other technical requirements serve no legitimate governmental purposes. Moreover, it concluded that the state's acknowledged interest in seeing that candidates on the ballot have substantial public support does not justify the 5%/1250 rule. Indeed, New York provides an option to political parties providing for the collection of the least of 0.5% or 1000 signatures in each district as a fully permissible alternative scheme. The district court noted that

this alternative scheme by its very existence demonstrates that the 5%/1250 requirement is unnecessary to satisfy the New York's interest in seeing that no candidate be on the ballot without substantial public support. We agree with the district court.

With regard to causation, the district court found that legitimate efforts were made by the Forbes slates of delegates to get on the ballot in the districts in question but that the burdensome and highly technical requirements described above stymied these efforts. Nevertheless, the Forbes slates did collect in excess of 0.5% of valid (even by New York's whimsical standards) signatures of Republican voters in each of the districts in question and thus would have qualified under the alternative scheme. The district court therefore ordered inclusion of the Forbes slate on the ballot in each of the districts. The district court's finding of causation in fact is not clearly erroneous, and its use of the 0.5% requirement in fashioning a remedy satisfies any interest of the state in limiting the ballot to candidates with substantial support in each district.

We therefore affirm. The mandate shall issue forthwith.

Supplemental Appendix 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

LARRY ROCKEFELLER, et al.,

Plaintiffs,

STEVE FORBES, individually and as a Candidate for President of the United States, et al.,

Plaintiffs-intervenors,

- against -

WILLIAM POWERS, et al.,

Defendants.

MEMORANDUM & ORDER

(CORRECTED FOR PUBLICATION)

95 CV 4478 (ERK)

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Korman, J.

This case is before me on a renewed motion for a preliminary injunction following the completion of the petitioning phase of the 1996 New York Republican primary to select delegates to the Republican National Convention. The complaint and application for preliminary relief were originally filed on November 13, 1995, just prior to the commencement of the "petitioning phase" of the primary. At that time, plaintiffs contended that the ballot access signature requirements adopted by New York State and the New York Republican State Committee violated the Equal Protection Clause because the burdens on ballot access they placed on delegate candidates in congressional districts with relatively few Republicans were substantially higher than the burdens they placed on districts with many Republicans. Although plaintiffs also alleged that the ballot access requirements constituted an undue burden, I did not reach that prong of their complaint. I addressed only their Equal Protection Clause claims and granted preliminary relief that would have reduced the

signature requirements in half of the districts. *See Rockefeller v. Powers*, No. 95 CV 4478, 1995 WL 744927 (E.D.N.Y. Dec. 13, 1995).

In so doing, I observed that the ballot access requirements adopted by New York State and the Republican State Committee could not be sustained because, as applied, they unreasonably discriminated based on the number of Republicans enrolled in a congressional district:

> In those districts in which it is easier to find a needle in haystack than an enrolled Republican, they require signatures from a percentage of enrolled Republicans three times greater than is required in the large majority of congressional districts, where the number of enrolled Republicans approaches or substantially exceeds 100,000 and the difficulty of finding them is greatly reduced.

Rockefeller v. Powers, 1995 WL 744927, at *5 (E.D.N.Y. 1995). Moreover, after examining the rationale behind this apparently discriminatory scheme I concluded that

> The only justification appears to be a desire to increase the advantage already enjoyed by the presidential candidate favored by the Party organization. The favored candidate has the benefit of an in-place organization that can gather the required signatures for delegates with relative ease. Differences in the burdens imposed in different districts are unlikely to have any significant practical effect on the ability of delegates pledged to the favored candidate to obtain the requisite number of signatures. In contrast, such differences may have a substantial impact on candidates who are independent of the Party organization. Because of shortages of time and resources, these candidates, engaging in national campaigns, may be forced to forego petitioning in many small districts and focus only on districts, or other states, where ballot access is relatively easy. In the congressional districts in New York with the fewest

> Republicans, the Party's candidate will be locked in and the voters who would have voted for other candidates will be locked out.

Id.

The Second Circuit reversed, in part because it did not agree with plaintiffs' "empirical claim that the [ballot signature requirement] establishes a likelihood of *significantly reduced* choice in districts with fewer Republicans compared to more heavily Republican districts." *Rockefeller v. Powers*, No. 95-9189, 1995 WL 790831, at *8 (2d Cir. Dec. 21, 1995). Based on its own review of plaintiffs' affidavits, which detailed the results of the petitioning phase in the 1988 New York Republican Party primary, the Court of Appeals concluded:

> There does appear to be a correlation between (a) the districts with more than two candidates on the ballot and (b) the number of registered Republicans in those districts; none of the fifteen least Republican districts had more than two candidates on the ballot. But we think that the difference between three slates and two slates is decidedly less significant than the difference between two slates and one slate. The contention that the fundamental right to vote is infringed in single-candidate districts (where there is arguably no choice) is a very different contention (and a much stronger one) than the contention that the fundamental right to vote is infringed in districts with two candidates on the ballot.

Id. at *9.

The results of the 1995-96 petitioning phase show the same correlation that the Court of Appeals saw in the 1988 data. As in 1988, the choice of ballot access restrictions that require slates of delegates pledged to a particular candidate to obtain signatures from 5% or 1250 of the enrolled Republicans in each district was made by the Republican State Committee from two choices offered by New York law. *See Rockefeller*

v. Powers, 1995 WL 790831, at *2 (2d Cir. 1995). Delegate slates committed to Senator Robert Dole, the candidate endorsed by the Committee and favored by the Party apparatus, are on the ballot in every district. In sixteen of the seventeen most densely Republican districts, both Steve Forbes and Patrick Buchanan slates also attempted to get on the ballot. In eleven of these districts both groups succeeded and the voters will, therefore, have a choice of three candidates. In four of them, the voters' only choice will be between Senator Dole and Mr. Forbes and in one, the 24th, only Senator Dole will be on the ballot.

The situation in the fourteen districts with the fewest Republicans is dramatically different. In those districts, both challengers to the Party favorite attempted to get on the ballot in the same districts only eight times and in only one district did they both succeed. After court challenges, voters in eleven of the fourteen least densely Republican districts will have a choice between Senator Dole and only one other candidate and in two, the 9th and 15th, only Senator Dole will be on the ballot.

The evidence of the burden imposed by this statutory scheme is even more telling if one looks behind the numbers. Of the candidates who accept public financing under the Federal Election Campaign Act of 1971, only one candidate, other than the Republican State Committee's favored candidate, even attempted to devote the resources necessary to place delegate slates on the ballot. This candidate, Patrick Buchanan, made the effort in twenty-four of the thirty-one districts. Nevertheless, he was ultimately successful in only thirteen districts, ten of which are high-density districts. The other candidate who challenged the candidate favored by the Republican State Committee is Mr. Forbes, who was not bound by the campaign finance laws. Had Mr. Forbes, whom the defendants characterize as "highly atypical in ways that the first amendment does not particularly favor," (Defs.' Opp. to Mot. for Prelim. Inj. at 13), not entered the race, the effect of New York's ballot access scheme would have been to deny voters in the eleven least densely Republican districts (and

eighteen of all thirty-one districts) any choice while permitting a choice of two candidates in thirteen of the twenty most densely Republican districts.[1]

That the Forbes campaign's petition drive was far more potent than could be expected from candidates lacking his huge personal fortune is demonstrated by the approaches taken by the other major candidates who were not favored by the Republican State Committee. This year, the only other such candidate who made an effort to get on the ballot in New York was Patrick Buchanan, whose candidacy derived a significant advantage due to extraordinary media exposure unrelated to a career in public office. *See* A. M. Rosenthal, *Making of Buchanan*, N.Y. Times, Feb. 16, 1996, at A33. All other Republican candidates in a relatively large field that included the former Governor of Tennessee and Secretary of Education, Lamar Alexander, Senator Richard Lugar, and Senator Phil Gramm, opted not to compete in New York. The plaintiffs have provided an affidavit from the chairman of Senator Gramm's campaign, Charles Black, averring that Senator Gramm chose to forego New York after estimating that even a mildly successful petition drive would have cost the campaign one million dollars. (Black Aff. ¶ 22.) The affidavit states that "[a]bsent New York's arcane and burdensome ballot access requirements and procedures, I would have counseled the Campaign to compete in the New York Primary. However, it is currently prohibitive for Non-favored Candidates to compete in New York. For these reasons, the [Gramm] Campaign elected not to compete in New York." (Black Aff. ¶ 24.)

While the Gramm campaign and others chose to forego New York altogether, the thrust of Mr. Black's affidavit is similar to the affidavits submitted on behalf of Senator Dole

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[1] A chart describing the results of the 1995-96 petitioning phase is annexed hereto as Appendix A. The chart shows that in none of the 11 districts with a signature requirement of more than 1.54% will voters have a choice of more than two candidates.

and Pat Robertson in the 1988 legal challenge to New York's ballot access restrictions. While Senator Dole and Pat Robertson did not entirely forego the 1988 New York Republican primary, they did not attempt to get on the ballot in all thirty-four of the congressional districts and were not successful in many in which they devoted considerable resources to the effort.[2] Mr. Pepe, the executive director of the Dole campaign in 1988, wrote that the New York ballot access scheme at issue here

> imposed considerable burdens on the state campaign. Despite the labors of approximately 600 members of the Dole campaign staff, both paid and volunteer, across the state, and an expenditure of approximately $90,000 to accomplish the task, the Dole campaign was able to file petitions for slates of three delegate candidates for only 22 of the state's 34 congressional districts.
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> ....
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> Given the staffing realities and the strictures of New York law, the Dole campaign made the difficult decision to devote its resources and energies to filing petitions in 22 congressional districts, identified as ones in which the campaign was run up, staffed and organized at local levels to attempt the necessary petition drive to place delegate candidates on the ballot. Thus certain congressional districts effectively had to be sacrificed from the ballot, given the finite numbers of people, funds, expertise and time available to conduct the necessary petition drives.

Mahon v. Abrams, No. 88 Civ. 1745, at 6-7 (S.D.N.Y. Mar. 21, 1988) (Sand, J.), *aff'd without op.*, 847 F.2d 835 (2d Cir. 1988). "A substantially similar affidavit [was] furnished in

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[2] The number of districts has since been reduced to 31 as a result of the 1990 census.

support of the application by Henry H. Hewes, executive director of the Americans for [Pat] Robertson campaign in the State of New York." *Id.*

A Dole slate ultimately appeared on the 1988 ballot in only eight districts and a Pat Robertson slate in only eleven. In their failure, Senator Dole and Mr. Robertson were not alone. Jack Kemp, who was an effective and widely known member of Congress from New York and who had an upstate political base, obtained a place on the ballot in fifteen of the thirty-four congressional districts. The only candidate with delegate slates on the ballot in every district was George Bush, the candidate favored by the Republican State Committee.[3]

Notwithstanding the compelling evidence that, at the very least, the statutory scheme in New York burdens the right to vote in the congressional districts with the fewest enrolled Republicans, the Court of Appeals decided, for a variety of reasons, that plaintiffs were not entitled to a preliminary injunction on the grounds that the statutory scheme at issue offended the Equal Protection Clause. While the outcome of the 1995-96 petitioning process provides further support for plaintiffs' equal protection argument, I decline to revisit that

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[3] The 1988 results I refer to in the text are drawn from an official listing provided by defendant New York State Board of Elections. (*See* letter from State Board of Elections of 2/22/96.) The official data for the 15th, 27th, 28th, 29th, and 34th districts differ from the data in the table printed in the margin of the Court of Appeals's opinion in this case. *See Rockefeller v. Powers*, No. 95-9189, 1995 WL 790831, at *4 n.7 (2d Cir. Dec. 21, 1995). The Court of Appeals's decision indicates that it, in turn, had relied on data printed in the appendix to defendants' appellate brief. *See id.* at *9 n.20. One of the principal differences between the Court of Appeals's data and the official data relates to the existence of three districts where no candidates were on the ballot. The Court of Appeals found it significant that "the only three districts in which no candidate qualified for the ballot were heavily Republican...." *Id.* at *4. Contrary to this finding, the official listings indicate that George Bush and Pat Robertson were both on the ballot in two of these districts and that Mr. Bush, Mr. Robertson and Mr. Dole were all on the ballot in the third.

issue here because the premises on which the Court of Appeals based its holding require the same result.

The issue that I did not address and the issue that the Court of Appeals expressly left open, *see Rockefeller v. Powers*, 1995 WL 790831, at *8 n.17 (2d Cir. 1995), is whether the New York ballot access rules constitute an undue burden on the right to vote in violation of the First and Fourteenth Amendments. This is the argument plaintiffs now press in their renewed application for a preliminary injunction and which I find merits the relief requested.

Discussion

The Supreme Court has held that "the right to vote is 'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). The foregoing discussion has shown that the statutory ballot access scheme in New York predictably and consistently operates to "heavily burden" the right to vote of Republican primary voters in a significant number of congressional districts. The issue here is whether it does so "unduly." As Chief Justice Burger observed in *Lubin*:

> It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. This does not mean every voter can be assured that a candidate to his liking will be on the ballot, but that the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars.

Id. While *Lubin* dealt with ballot access that was impermissibly burdened by filing fees, it is clear that signature and other requirements may likewise impermissibly burden voter choice.

Analysis of the validity of ballot access signature requirements to determine whether they unduly burden the right to vote proceeds in three steps:

> [A reviewing court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all of these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (internal citation omitted). The Supreme Court has recently explained how these factors should be balanced:

> Under this standard the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal citations omitted).

At the outset, it should be noted that a presidential primary requires a kind of campaign that is very different from an ordinary campaign for local office. In a national presidential campaign, ballot access restrictions that require enormous outlays of money and manpower will lead candidates to concentrate their resources in other states where the return on their investment, measured in terms of potential delegates and national exposure, will be greater per dollar spent. Thus, to prevent candidates from competing in a certain state, the state legislature need not adopt access restrictions that are, in the abstract, insurmountable. Instead, it need only adopt restrictions that are substantially more burdensome than those adopted in other states. This appears to be the approach taken in New York, which has the most restrictive ballot access signature requirements of any state that elects delegates in a primary.

The cornerstone of New York's ballot access scheme is the basic signature requirement. To get on the ballot for the Republican presidential primary in any one of New York's thirty-one congressional districts, delegates supporting a candidate for President must obtain signatures from 5% or 1250, whichever is less, of the enrolled Republican voters in the district. The total number of signatures necessary to put a candidate's name on the ballot in all thirty-one districts is approximately 37,000. Because signatures must be gathered in every district, presidential candidates who do not enjoy the support of the existing Party apparatus must create far-flung organizations that reach to every corner of New York State.

The first indication that a 5% or 1250 per district figure is unduly harsh is provided by the evidence of other states' practices.[4] The large majority of states are satisfied with no impediments to ballot access or impose only a small fee. The

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[4] Among the guideposts the Supreme Court has used to determine whether a burden on ballot access is "undue" are the burdens imposed in other states. *See, e.g., Storer v. Brown*, 415 U.S. 724, 739 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

only state with ballot access restrictions remotely comparable to New York's is Indiana, which requires 5,000 signatures statewide, including 500 from each of its ten congressional districts.[5] If this 500-signatures-per-district scheme were implemented in New York, the total number of signatures required statewide would be slashed by approximately 60% and by the same 60% in all but six districts, where the number of signatures would still be significantly reduced, but by a smaller amount.

Beyond the numerical requirements, New York imposes other constraints that make compliance with these requirements more difficult. *See Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994) ("[W]e proceed by the 'totality approach' and consider the alleged burden imposed by the challenged provision in light of the state's overall election scheme."). New York law prohibits a person from signing petitions for more than one candidate and invalidates any signatures given after the first. *See* N.Y. Elec. Law § 6-134(5). As the petitioning phase proceeds, the number of people still available to sign petitions decreases and the difficulty in finding them increases. The thirty-seven day petition-gathering period is, on its face, relatively short and, making matters worse, the petitioning phase now falls during the period from Thanksgiving to just after New Year's Day. As a result, petition gatherers were hampered by holidays and vacations, short days, and winter storms.

In addition, New York law will invalidate a signature for a host of defects that have nothing to do with whether the person who signed the petition was qualified to do so. For example, signatures can be invalidated for failure to comply with strict rules regulating who may witness a signature. *See* N.Y. Elec. Law § 6-132. The witness must be a registered

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[5] A state-by-state list of ballot access requirements compiled by plaintiffs from Karen M. Markin, *Ballot Access 3: For Presidential Candidates* (Nat'l Clearinghouse on Elec. Admin., Fed. Elec. Comm'n, Wash. D.C.) July 1995, is annexed hereto as Appendix B.

Republican voter from within the district or a notary public or Commissioner of Deeds. Requiring that the witness be a Commissioner of Deeds, specially qualified to witness a signature, or a Republican residing within the district, who has no such qualification, manifests two distinct rationales, if any, and therefore suggests that neither requirement performs an essential function.[6]

New York also requires each voter's signature to be accompanied, not only by the signer's address, but also by his or her election district number and, in New York City and Nassau County, his or her Assembly district number.[7] N.Y. Elec. Law. § 6-130. New York City and Nassau County already have computer systems that make this requirement obsolete, and probably unconstitutional as applied there, and the expenditure of $12,000 could bring the State Board of Elections into the computer age. *See Schulz*, 44 F.3d at 59. Nevertheless, it is another burden that must be borne. Because most voters do not know what district they are in, the campaign must fill in the information. Once this is accomplished, the

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[6] Strict enforcement of this witness qualification provision is responsible for knocking Mr. Forbes off the ballot in the 9th district. Of the 1922 signatures submitted on behalf of Forbes delegates there, 1063 were invalidated because they had been collected between November 28 and December 4 by "unqualified" witnesses. The witnesses had taken and passed the required test, paid the required filing fee, and been approved by the New York City Council for the office of Commissioner of Deeds, essentially the City's version of a notary public, but did not file their oaths of office with the City until December 4.

[7] Of the 1902 signatures gathered by the Forbes campaign in the 24th district, 257 were invalidated for stating an incorrect election district. The election district provided with those signatures was the pre-1995 election district, which had changed as a result of reapportionment. Although the Board of Elections found "that the claim of confusion due to reapportionment is reasonable, and thus that the old election districts may be accepted on the petition sheets in question," the New York State courts held that this "reasonable confusion" finding was erroneous and invalidated the signatures. This, along with 505 other invalidations on other grounds, left the Forbes delegates with an insufficient number of signatures to qualify for ballot access.

petition must be assembled in volumes, each accompanied by the appropriate summary sheet conforming to yet another list of technical requirements. *See* N.Y. Elec. Law § 6-134(2). The failure to comply with any of the requirements may trigger penalty provisions that invalidate substantial numbers of perfectly valid signatures.[8]

While each of these cumbersome and arcane rules alone may not be unduly burdensome, their net effect is to increase substantially the number of otherwise valid signatures a candidate needs to obtain to anticipate the inevitable challenges from the favored candidate of the Republican State Committee. The affidavit submitted by the Forbes campaign indicates that, at the very least, 140% of the statutorily prescribed number of signatures must be obtained in each district. (Slater Aff. ¶ 16.) The Republican State Committee Chairman, William Powers, however, suggests, that one of the reasons Mr. Forbes failed to secure a place on the ballot in the four districts where challenges succeeded in knocking his delegates off the ballot is that the Forbes campaign "*only* had a goal of 140% of the signature requirement." (Powers Aff. ¶ 21) (emphasis added.) Accordingly, the actual number of valid signatures necessary to place a slate on the ballot may significantly exceed 140% of the nominal requirement. This means that in districts where 1250 signatures are nominally required by law, candidates not supported by the Republican State Committee must obtain approximately 2000 signatures and in those where the requirement is nominally 5% it is actually between 7% and 8%. "This would be in excess, percentagewise, of anything the

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[8] In the 18th district, the Forbes campaign was severely penalized for an alleged overstatement on the summary sheet it provided for a set of volumes. The summary sheet reflected seven volumes but the Board of Elections apparently received only six and, therefore, found that the summary sheet overstated the number of signatures submitted. The original seventh volume was never found, but the Forbes campaign did produce a photocopy of the entire volume. Nonetheless, pursuant to N.Y. Election Law § 6-134, the Board did not count the 337 signatures and invalidated an additional 337 signatures as a penalty. The number of remaining signatures was 140 shy of the 1250 required for ballot access.

Court has approved to date as a precondition to an independent's securing a place on the ballot and in excess of the 5% which we said in *Jenness* [*v. Fortson*, 403 U.S. 431 (1971),] was higher than the requirement imposed by most state election codes." *Storer v. Brown*, 415 U.S. 724, 739 (1974); *see also Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262, 1268 (S.D. Ohio 1970) ("Rather than requiring a showing of voter interest, the seven percent requirement prohibits third parties from participating in elections."), *aff'd*, 409 U.S. 942 (1972).

The success of Mr. Forbes in gaining access to the ballot in twenty-seven of thirty-one districts does not show, as the Chairman of the Republican State Committee suggests, that "the New York Primary system does not unfairly exclude candidates." (Powers Aff. ¶ 21.) If Mr. Forbes was more successful than any other "independent" Republican candidate in recent history, there is certainly a good explanation. Mr. Forbes was willing to spend his own substantial fortune and, therefore, was unfettered by campaign financing laws. He spent one million dollars on petition gathering in New York. (Slater Aff. ¶ 10.) This amount dwarfs by a factor of ten the amount spent in 1988 by Senator Dole, who was, without question, a bona fide candidate.

The Forbes campaign estimates that its petition drive consumed 37,500 manhours, not including any time spent by Forbes's legal team working on administrative and judicial challenges. (Slater Aff. ¶ 14.) The campaign hired more than 320 full- and part-time petition circulators, which does not include lawyers, consultants and other staff. (Slater Aff. ¶ 10; Neary Aff. ¶ 9.) Ordinary circulators were paid $10 per hour and Commissioners of Deeds were paid $20 per hour. (Neary Aff. ¶ 10.) Each circulator received two hours of training on the technical requirements of the New York Election Law and how to use "walking lists." (Neary Aff. ¶ 18.) These walking lists, giving names and addresses of all registered Republicans, were purchased from the Board of Elections. (Slater Aff. ¶ 10.) In order to be of use in the field, the raw data in these lists were first converted by paid computer consultants into an

accessible format. (Slater Aff. ¶ 10.) Nonetheless, their utility was limited by inaccuracies in 30-50% of the data. (Neary Aff. ¶ 21(a).) With this effort, the Forbes campaign managed to accumulate, prior to any legal challenges, sufficient signatures to meet the numerical requirements in all thirty-one districts and still was knocked off the ballot in over 10% of the districts.[9]

The petition drive orchestrated by Mr. Forbes, rather than proving that "the New York Primary system does not unfairly exclude candidates," (Powers Aff. ¶ 21), shows just the opposite. It demonstrates that without the support of the New York Republican State Committee, only the most atypical of candidates, one with unlimited financial resources, can come even close to replicating the unique ability of the favored candidate to obtain ballot access for delegates pledged to him or her. Indeed, defendant Powers's affidavit only emphasizes this point. Mr. Powers cites Patrick Buchanan as an example of "other successful candidates who built their petition effort around highly motivated volunteers" committed to the candidate's ideas:

> Patrick Buchanan's campaign identified supporters who were community leaders to serve as delegate candidates. Generally, it was these delegates themselves, or family and friends they recruited, who went to their neighbors and to fellow community activists for the requisite signatures. The Buchanan Campaign demonstrates that a candidate with limited resources, but who organizes a dedicated group of volunteers, can get his or [sic] delegate slates on the ballot in New York.

(Powers Aff. ¶ 13.) Nevertheless, Mr. Powers is forced to concede that "[d]elegate candidates supporting Mr. Buchanan

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[9] The number of successful challenges would have been higher had challenges to the Forbes slates in six New York City districts not been dismissed because the challengers failed to provide the addresses of the delegates on the challenged slates.

are on the ballot in 12 districts," only half the number in which he sought access. *Id.*[10] Playing by the rules of the Federal Election Campaign Act of 1971, Mr. Buchanan's "successful" campaign in New York, which was "grass roots," will enable him to compete for little more than a third of the delegates to be elected in the New York primary. This experience mimics that of Senator Dole in 1988. Senator Dole was then the Senate Minority Leader, he had been the Republican vice-presidential nominee in 1976, and he had "been historically supportive of local Republican candidates in New York and supportive of Party-building activities," (Powers Aff. ¶ 27). Nevertheless, without Mr. Forbes's money or the support of the Republican State Committee, he managed to get slates on the ballot in only eight of the thirty-four congressional districts.

The rarity of a candidate who is willing and able to target all or almost all of the districts in New York is what is most troubling. History shows that the candidate who is not favored by the Party will *never* target every district, unless he is a Steve Forbes. Even if he is a Steve Forbes, he will not succeed in gaining access to the ballot in every district. By itself, the inability of any challenger to accomplish this task means that, even under the best of circumstances, voters in several districts will inevitably be left without a choice in a state-sponsored presidential primary.[11] More importantly, the inability to compete statewide with the Party favorite has led viable challengers not to compete in *any* district. If the New York districts are indistinguishable from thirty-one separate states, each with only one congressional district and,

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[10] On February 16, 1996, two days after Mr. Powers signed his affidavit, the Appellate Division ordered the Buchanan slate placed on the ballot in the 30th congressional district, raising to 13 the number of districts with Buchanan slates on the ballot.

[11] Nor is there evidence that suggests that delegate slates without financial and technical support from a candidate have been able to make the concerted effort necessary to organize a petition drive and guide it past logistical and legal challenges through to its successful completion.

therefore, only three delegates at stake, this behavior on the part of viable presidential campaigns is irrational. Just because a candidate has little chance of success in one single-district state would not provide a reason not to compete in a neighboring single-district state.

Nonetheless, there is no evidence that a candidate has ever attempted to get on the ballot in only a single New York district. This year, only candidates who could attempt to get on the ballot in at least twenty-four districts and hope to succeed in half of those chose to compete in New York. This suggests that the ante to enter the race in New York is between 15,000 and 30,000 signatures. Anyone who wants to play with less must, and always does, go somewhere else. This high cost of entry makes the burden in every district in New York severe, even where the signature requirement in isolation is not very difficult to satisfy.

There is, to be sure, language in the opinion of the Court of Appeals that supports the conclusion that what will take place on March 7, 1996, is thirty-one separate primaries coincidentally occurring within the geographical boundaries of the State of New York. *See Rockefeller v. Powers*, 1995 WL 790831, at *9-*10 (2d Cir. 1995). The Republican State Committee does not view the New York Primary in this way, (*see* Powers Aff. ¶ 6-7), and the language that supports this view cannot be divorced from the equal protection analysis of which it is a part. The Court of Appeals suggested that the burdens in each congressional district in New York State could not be compared for purposes of the Equal Protection Clause, but never suggested that the burden in all thirty-one districts, which a presidential candidate must confront simultaneously, could not be taken together for purposes of an undue burden analysis. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983) ("[I]n a Presidential election a State's enforcement of more stringent ballot access requirements...has an impact beyond it own borders.").

Having assessed the burden and found it a heavy one for candidates, delegates, and voters alike, I now turn to the

state's interest in imposing such heavy restrictions on ballot access. The alleged justification here is the same as in other ballot access cases, namely, "the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The New York Legislature, however, has made it plain that New York's interest in limiting ballot access to those candidates who can demonstrate a modicum of support is satisfied by a 0.5% or 1000 requirement,[12] which is the alternative to the 5% or 1250 scheme, that would have satisfied the Legislature had it been selected by the Republican State Committee. *See* 1995 N.Y. Laws Ch. 586. This demonstrates that New York State has no compelling interest in a more restrictive rule than 0.5% per congressional district.

While the Legislature has offered each political party the option of which alternative to choose, as has been the practice in recent presidential election years, the choices merely codify each party's preferred method of ballot access for its primary. What appear to be the options from which the parties may choose are in fact the choices they have already made. The option requiring 0.5% or 1000 is the one requested by the Democratic Party and the option requiring 5% or 1250 is the one requested by the Republican Party. (Powers Aff. ¶ 27) ("New York has merely acquiesced in a choice the [Republican] Party made."). Nevertheless, this choice does not necessarily reflect a legitimate state interest entitled to special deference. In *Anderson*, the Supreme Court observed that, notwithstanding its prior recognition "of the State's interest in preventing 'splintered parties and unrestrained factionalism'...we did not suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters." *Anderson*, 460 U.S. at 803. In a footnote to this text, the Supreme Court observed in language particularly apposite here that, "[e]ven though the drafting of election laws is no doubt largely the handiwork of

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[12] In no district, however, is 0.5% of the number of enrolled Republicans more than 1000.

the major parties that are dominant in state legislatures, it does not follow that the particular interests of the major parties can automatically be characterized as legitimate state interests." *Id.* at 803 n.30.

The Republican State Committee in New York endorsed Senator Dole and "the vast majority of State Committee officials and workers support Bob Dole." (Powers Aff. ¶ 26.) The same Republican State Committee, in its capacity as a state actor, selected a ballot access rule far exceeding the minimum acceptable to New York State. The rule the Committee chose consistently and decisively advantages the candidate it supports and discourages and disadvantages the candidates it has rejected. The desire of the Republican State Committee to choose rules that give its favored candidate the kind of advantage reflected by the record here, while entirely understandable, cannot be "characterized as a legitimate state interest."

In sum, the New York scheme fails to pass the simple, sensible test the Supreme Court offered in *Storer v. Brown* as a guide to district court judges who must address "the inevitable question for judgment," *Storer v. Brown*, 415 U.S. 724, 742 (1974), in an area that "provides no litmus-paper test," *id.* at 730:

> [C]ould a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?

Id. at 742. The answer is that, in some districts, in some years, a candidate other than the favored candidate could. Indeed there will always be a candidate, almost always an atypical one, who, because of fame and fortune or a political base within New York, will prevent the Republican State Committee from holding a primary without any contests in all thirty-one districts. Nevertheless, there will always be a significant number of districts without any contest, where the "fundamental right to vote is infringed," *Rockefeller v. Powers*, 1995 WL 790831, at *9 (2d Cir. 1995), and an even greater number of districts with a very limited choice, where

the right to vote is "heavily burdened," *Lubin v. Panish*, 415 U.S. 709, 716 (1974). Such a scheme, not justified by any sufficiently compelling state interest, is unconstitutional.

The defendants, however, argue that, even if plaintiffs are likely to succeed in their constitutional challenge, they are not entitled to the preliminary injunctive relief they seek. Specifically, relying on Judge Sand's opinion in *Mahon v. Abrams*, No. 88 Civ. 1745 (S.D.N.Y. Mar. 21, 1988), *aff'd without op.*, 847 F.2d 835 (2d Cir. 1988), defendants allege that plaintiffs' request for relief comes too late. This claim fails for several reasons. In *Mahon*, plaintiffs in the fifteen congressional districts in which George Bush, the candidate favored by the Republican State Committee, was the only candidate on the ballot sought to have slates of delegates pledged to Senator Dole and Pat Robertson placed on the ballot. In dealing with the defendants' objections to the delay in seeking preliminary injunctive relief, Judge Sand denied "the motion to dismiss as to laches." *Id.* at 12. Nevertheless, he found that "timing consideration tilt[ed] the balance...overwhelmingly in favor of the defendants," *id.*, because it would be possible to grant the requested relief only "if one were to eliminate entirely the requirement of any petitions or signatures for the Dole-Robertson slates." *Id.* at 12-13. This result, he concluded, "would be exceedingly unfair to a candidate who engaged in the petition signature process, and would deprive the state of the valid reasons which a state has for requiring some showing of local support for incurring the expense and time and effort of a primary campaign." *Id.* at 13. This consideration is not implicated by the relief sought here.

I have before me voters from four districts whose application to intervene I have granted. There is only one slate on the ballot in three of these districts and a choice between only two slates in the fourth. These voters ask for the opportunity to vote for Mr. Forbes in the New York Republican primary. Even after the challenges to his petitions in these districts were sustained, Mr. Forbes has valid signatures in each of these districts that far exceed in number the amount that would be required to satisfy the 0.5% requirement with which

New York State would be satisfied. In three of the districts the number far exceeds the percentage required in the districts with the most Republicans.

There are other reasons here why timing considerations do not tip the balance against injunctive relief. The New York Legislature contemplates litigation over ballot access challenges. Indeed, it was not until last Friday, February 16, 1996, the day that the order to show cause was returnable here, that the legal challenges to the petitions filed by Mr. Forbes and Mr. Buchanan were finally resolved. These eleventh-hour legal battles necessarily mean, as testimony before Judge Sand established, "that last minute ballot revisions are not uncommon in New York State elections...." *Id.* at 12.

These considerations aside, there are prudential and equitable considerations that tilt the balance against denying the motion because of "delay." The Republican State Committee did everything possible to frustrate a timely resolution of the anticipated legal challenges to the scheme they adopted. Although it could have done so as early as August 8, 1995, when the ballot access law was signed by Governor Pataki, the Republican State Committee waited until October 31, 1995, the last possible day, to elect the 5% or 1250 option that they had asked the Legislature to give them. No explanation has been offered for this delay, and the Republican State Committee has never denied that it was motivated by a desire to deflect for lack of ripeness an earlier legal challenges. Indeed, on appeal from the initial preliminary injunction, as late as December 21, 1995, defendants argued the controversy was still not ripe because "there is no guarantee that a change in the ballot access rule would widen [plaintiffs'] choices, particularly since the plaintiffs cannot identify candidates who have already been or definitely will be excluded by the signature requirement." *Rockefeller v. Powers*, 1995 WL 790831, at *6 (2d Cir. 1995).

While this argument was rejected by the Court of Appeals, it was not altogether without merit as a prudential matter. By awaiting the outcome of the petition gathering process to

press the previously (and timely) asserted claim of "undue burden," plaintiffs can now provide direct, pertinent, and fresh evidence of the effects of the statutory scheme. Moreover, by awaiting the good faith efforts of Mr. Forbes to comply with the ballot access requirements to the extent that he could, the problem that Judge Sand found particularly troubling has been avoided. Under these circumstances, the lateness of the hour should not bar relief where equitable and legal considerations render such relief appropriate.

Conclusion

The defendants are ordered to place on the ballot in the 9th, 15th, 18th and 24th districts the names of the Forbes delegates. The order is stayed through Tuesday, February 27, 1996, the next scheduled motion day of the Court of Appeals, when defendants may seek a further stay pending appeal.

SO ORDERED

/s/ Edward R. Korman

United States District Judge

Dated: Brooklyn, New York
February 21, 1996

APPENDIX A

The following chart indicates the number and percentage of signatures required in each district and the number of candidates who succeeded in meeting the requirement. (D=Dole; F=Forbes; B=Buchanan.) The data show a correlation between the level of the signature requirement, expressed as a percentage, and the number of choices available to voters. No district with a requirement of more than 1.54% will have a choice of more than two candidates.

CD	#/Republicans	#/Signatures	%	#/Candidates	
3	158,097	1250	.79	3	D F B
22	153,824	1250	.81	3	D F B
27	148,319	1250	.84	2	D F
4	148,013	1250	.84	3	D F B
23	143,555	1250	.87	3	D F B
31	137,952	1250	.91	3	D F B
24	136,788	1250	.91	1	D
1	129,111	1250	.97	3	D F B
25	124,260	1250	1.01	3	D F B
26	116,360	1250	1.07	2	D F
19	114,008	1250	1.10	2	D F
29	113,561	1250	1.10	3	D F B
28	112,797	1250	1.11	3	D F B
2	112,442	1250	1.11	2	D F
20	102,232	1250	1.22	2	D F
13	88,350	1250	1.41	3	D F B
21	86,470	1250	1.45	3	D F B
5	85,213	1250	1.47	2	D F
18	85,062	1250	1.47	2	D B
30	80,970	1250	1.54	2	D F B
14	52,555	1250	2.38	2	D F
9	52,511	1250	2.38	1	D
7	46,303	1250	2.70	2	D F
8	33,247	1250	3.76	2	D F
6	26,457	1250	4.72	2	D F
17	23,090	1155	5.00	2	D F
12	20,215	1011	5.00	2	D F

CD	#/Republicans	#/Signatures	%	#/Candidates	
10	17,114	856	5.00	2	D F
15	15,561	778	5.00	1	D
16	14,852	743	5.00	2	D F
11	11,814	591	5.00	2	D F

APPENDIX B

The following listing of state ballot access requirements was compiled by plaintiffs from Karen M. Markin, *Ballot Access 3: For Presidential Candidates* (Nat'l Clearinghouse on Elec. Admin., Fed. Elec. Comm'n, Wash. D.C.) July 1995. The symbol "n/a" indicates that a presidential primary is not held.

STATE	SIGNATURES REQUIRED
Alabama	500 statewide or 50 per congressional district
Alaska	n/a
Arizona	0
Arkansas	0
California	0 if candidate is generally recognized in the media
Colorado	5000 statewide or $500 fee
Connecticut	0 if candidate is generally recognized in media
Delaware	500 statewide or 0 if candidate qualifies for matching funds
Dist. of Columbia	1000 or 1%
Florida	0
Georgia	0
Hawaii	n/a
Idaho	0 if candidate is generally recognized media
Illinois	3000 statewide
Indiana	5000 statewide, including 500 from each congressional district
Iowa	n/a
Kansas	1000 statewide or $100 fee

STATE	SIGNATURES REQUIRED
Kentucky	0 if candidate qualifies for matching funds or 5000 statewide
Louisiana	1000 per congressional district or $750 filing fee
Maine	0
Maryland	0 if candidate is generally recognized in the media
Massachusetts	0 if candidate is generally recognized in the media
Michigan	0 if candidate is generally recognized in the media
Minnesota	2000 statewide or $500 fee
Mississippi	0 if candidate is generally recognized in the media
Missouri	n/a
Montana	2000 statewide
Nebraska	0 if candidate is generally recognized in the media
Nevada	n/a
New Hampshire	0 if candidate is generally recognized in the media
New Jersey	1000 statewide
New Mexico	0 if candidate is generally recognized in the media
New York	5% or 1250 in each congressional district
North Carolina	0 if candidate is generally recognized in the media
North Dakota	300 statewide
Ohio	0 if candidate is eligible to receive matching funds
Oklahoma	1000 per congressional district or $2500 fee

STATE	SIGNATURES REQUIRED
Oregon	0 if candidate is generally recognized in the media
Pennsylvania	2000 statewide
Rhode Island	1000 statewide
South Carolina	0
South Dakota	0
Tennessee	0 if candidate is generally recognized in the media
Texas	0 (unless required by party rule)
Utah	n/a
Vermont	1000 statewide and $500 fee
Virginia	n/a
Washington	0 if candidate is generally recognized in the media
West Virginia	1% of presidential salary or 4 signatures for each dollar of fee
Wisconsin	0 if candidate is generally recognized in the media
Wyoming	n/a